86-219

No. 86—

Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOUTHERN UNION COMPANY,
UNICON PRODUCING COMPANY,
SOUTHLAND ROYALTY COMPANY and
EXXON CORPORATION,
Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior,
and STATE OF NEW MEXICO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SETH D. MONTGOMERY
(Counsel of Record)
MARK F. SHERIDAN
ANNE B. HEMENWAY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873
Attorneys for Petitioner
Southern Union Company

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

In *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983), this Court stated, "If in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties."

The questions presented by this petition are:

(a) Whether the Federal Government violates its obligation to an Indian tribe when it determines royalties under oil and gas leases issued pursuant to the Indian Mineral Leasing Act of 1938 through an exercise of discretion as expressly authorized by federal law and regulation; and

(b) Whether, even if it does so, the Tribe's remedy for such violation is against third parties who do not participate in the Government's breach of trust but instead rely upon the Government's determination of royalties under federal law and regulation.

LIST OF PARTIES

The caption contains the names of all parties to the proceedings before the United States Court of Appeals for the Tenth Circuit.

Petitioner, Southern Union Company, is a corporation organized under the laws of the State of Delaware, whose principal place of business is Dallas, Texas. Southern Union Company has no parent corporation and no subsidiaries or affiliates other than wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	3
STATUTES AND REGULATIONS INVOLVED	4
STATEMENT OF THE CASE	4
I. THE FACTUAL SETTING	5
A. The Production and Sale of Natural Gas Under the IMLA Leases and the Extraction of Liquid By-Products	5
B. The Secretary's Determination of the Tribe's Royalties	7
II. PROCEEDINGS IN THE COURTS BELOW	9
A. The Tribe Sues for Additional Royalties Based on Dual Accounting.	9
B. The District Court Rejects Dual Accounting, Then Reverses Itself.	11
C. The Court of Appeals Expressly Rejects the Imposition of Fiduciary Standards, Then Reverses Itself.	12
D. The Court of Appeals Imposes Liability Against the Lessees for the Federal Government's Breach of Trust to the Tribe.	13
E. The Federal Government Seeks to Impose Liability on the Lessees, While Maintaining That It Has Never Breached Its Obligation to the Tribe.	14

TABLE OF CONTENTS—Continued

	Page
REASONS FOR GRANTING THE WRIT	16
I. THE COURT OF APPEALS ERRONEOUSLY IMPOSED LIABILITY ON INNOCENT THIRD PARTIES FOR THE FEDERAL GOVERNMENT'S PURPORTED BREACH OF TRUST.	16
A. The Decision Below Conflicts With *Nevada v. United States, United States v. Mitchell* and *Seminole Nation v. United States.*	16
B. The Decision Below Interferes With and Undermines Indian Contracts and the Development of Indian Leasing Enterprises.	19
II. THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD WHEN IT DETERMINED THAT THE FEDERAL GOVERNMENT COMMITTED A BREACH OF TRUST.	21
A. The Decision Below Conflicts With *United States v. Mason, United States v. Mitchell* and Decisions of the Court of Claims.	22
B. This Court Should Determine the Standard for the Government's Breach of Indian Trust Obligations Because of Its Fundamental Importance to the Discharge of Federal Fiduciary Duties.	25
CONCLUSION	28

TABLE OF AUTHORITIES

CASES Page

American Indians Residing on the Maricopa-Ak Chin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982) .. 22
Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1970) 24
Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977) 22
Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950) 23
In re Supron Energy Corp., 46 I.B.L.A. 181 (1980) 3, 10
Jicarilla Apache Tribe v. Supron Energy Corp., 479 F. Supp. 536 (D.N.M. 1979) 2
Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555 (10th Cir. 1984) 2
Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) 1, 16, 21
Jicarilla Apache Tribe v. Supron Energy Corp., 793 F.2d 1171 (10th Cir. 1986) 1, 2, 4
Mitchell v. United States, 664 F.2d 265 (Ct. Cl. 1981) 24, 25
Mitchell v. United States, 10 Cl.Ct. 63 (1986) 21
Moose v. United States, 674 F.2d 1277 (9th Cir. 1982) 22
Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980) 22
Navajo Tribe of Indians v. United States, 9 Cl.Ct. 336 (1986) 25
Nevada v. United States, 463 U.S. 110 (1983), Rehearing Denied Subnom. *Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District*, 464 U.S. 875 (1983) ..... *passim*
Seminole Nation v. United States, 316 U.S. 286 (1942) 18, 19
United States v. Dann, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985) 18
United States v. Mason, 412 U.S. 391 (1973) 22, 23, 24, 25
United States v. Mitchell, 463 U.S. 206 (1983) ..... *passim*

TABLE OF AUTHORITIES—Continued

STATUTES Page

Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982) 3, 9
Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (1982) 3
Clayton Act, 15 U.S.C. §§ 15, 19 (1982) 3
25 U.S.C. § 309 (1982) 19, 20
Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-g (1982) ..... *passim*
25 U.S.C. § 397 (1982) 20
25 U.S.C. § 398a-e (1982) 20
25 U.S.C. § 399 (1982) 20
25 U.S.C. § 400a (1982) 20
25 U.S.C. § 402a (1982) 20
25 U.S.C. § 403 (1982) 20
25 U.S.C. §§ 415, 415a-d (1982) 20
Johnson-O'Malley Act, 25 U.S.C. §§ 452, 453, 454, 457 (1982) 20
25 U.S.C. §§ 458(a)-(g), 458a-e (1982) 20
25 U.S.C. § 466 (1982) 20
Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.* (1982) 20
25 U.S.C. § 2001 (1982) 20
Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1982) 25
28 U.S.C. § 1254(1) (1982) 4
28 U.S.C. § 1331 (1982) 3, 9
28 U.S.C. § 1332 (1982) 3, 9
28 U.S.C. § 1362 (1982) 3, 9

REGULATIONS

25 C.F.R. § 163.4 (1985) 21
25 C.F.R. § 163.5 (1985) 21
25 C.F.R. § 171.13(a) (1981) 7
25 C.F.R. § 211.13(a) (1985) 7, 9, 10, 23
30 C.F.R. Part 206 (1985) 8
30 C.F.R. § 206.105(b) (1985) 10
30 C.F.R. § 206.105(c) (1985) 9
30 C.F.R. § 206.106 (1985) 9
30 C.F.R. Part 221 (1981) 8
30 C.F.R. § 221.3 (1981) 8, 23
30 C.F.R. § 221.4 (1981) 23

TABLE OF AUTHORITIES—Continued

Page

30 C.F.R. § 221.12 (1981) 8, 9, 23
30 C.F.R. § 221.13 (1981) 8
30 C.F.R. § 221.38 (1981) 8
30 C.F.R. § 221.40 (1981) 8, 9, 23
30 C.F.R. § 221.47 (1981) 8, 23, 24
30 C.F.R. § 221.62 (1981) 8
30 C.F.R. § 221.63 (1981) 8
43 C.F.R. Part 3160 (1985) 8

OTHER AUTHORITIES

7 Fed. Reg. 4132 (1942) 8
G. Bogert, *Law and Trusts and Trustees* §§ 901, 902 (2d ed. rev. 1982) 18
Restatement (Second) of Trusts §§ 284, 296, 297 (1959) 18
III A. Scott, *Law of Trusts*, § 187 (3d ed. 1967) 24
III A. Scott, *Law of Trusts*, § 187.2 (3d ed. 1967) 24
IV A. Scott, *Law of Trusts*, §§ 279A, 283, 296 (3d ed. 1967) 18
American Indian Policy Review Comm'n, *Final Report* 339 (1977) 27
H.R. Rep. No. 746 on Indian Mineral Development Act of 1982, 97th Cong., 2d Sess., 7-8, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3465, 3469-70 26
Indian Gov't Operations Comm., *Indian Gas Royalty Payments—Problems Persist* (July 19, 1985) cited in *Hearings on Department of Interior and Related Agencies Appropriations for 1987 Before the Subcomm. of the H.R. Comm. on Appropriations*, 99th Cong., 2d Sess., at 505 (Comm. Print 1986) ("*Hearings on Appropriations*") 26
Interim BIA Task Force/Study Group Report on Indian Oil and Gas Lease Administration and Royalty Management (Jan. 1985), quoted in *Hearings on Appropriations*, at 520 26
Report of the Surveys and Investigations Staff, H.R. Comm. on Appropriations, at 2-3 (April 17, 1986), quoted in *Hearings on Appropriations*, at 517-18 ..... 26, 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86——

SOUTHERN UNION COMPANY,
UNICON PRODUCING COMPANY,
SOUTHLAND ROYALTY COMPANY and
EXXON CORPORATION,
Petitioners,

v.

JICARILLA APACHE TRIBE,
DONALD P. HODEL, Secretary of the
United States Department of the Interior,
and STATE OF NEW MEXICO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Southern Union Company, respectfully prays that a Writ of Certiorari issue to review the *en banc* judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on January 23, 1986, reported at 782 F.2d 855 (10th Cir. 1986), supplemented on June 18, 1986, reported at 793 F.2d 1171 (10th Cir. 1986).

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit on rehearing en banc rendered its decision on January 23, 1986. The decision is reported at 782 F.2d 855 (10th Cir. 1986) and is reprinted in the Petitioners' Joint Appendix ("Jt. App.") at Jt. App. 1a. Petitioners' Joint Appendix is filed concurrently herewith on behalf of the Petitioners, Southern Union Company, Unicon

Producing Company, Southland Royalty Company and Exxon Corporation. The Court of Appeals supplemented its *en banc* decision on June 18, 1986. The supplemental decision is reported at 793 F.2d 1171 (10th Cir. 1986) and is reprinted at Jt. App. 18a. The decision of the three-judge panel of the Court of Appeals, which first heard this appeal, was rendered February 24, 1984. The panel decision is reported at 728 F.2d 1555 (10th Cir. 1984) and is reprinted at Jt. App. 21a. The opinion and order of the United States District Court for the District of New Mexico following the trial on the merits was entered November 5, 1979. The decision is reported at 479 F. Supp. 536 (D.N.M. 1979) and is reprinted at Jt. App. 104a.

In addition, the following opinions and orders of the District Court are reprinted in the Petitioners' Joint Appendix: (a) Opinion and Order of the United States District Court for the District of New Mexico on cross-motions for partial summary judgment, filed September 7, 1978, at Jt. App. 66a and 73a; (b) Opinion and Order of the United States District Court for the District of New Mexico denying plaintiff's motion to reconsider partial summary judgment, filed December 19, 1978, at Jt. App. 75a; (3) Opinion and Order of the United States District Court for the District of New Mexico denying defendants' motion to dismiss plaintiff's second amended complaint, filed April 13, 1979, at Jt. App. 79a and 102a; (d) Opinion and Order of the United States District Court for the District of New Mexico pertaining to accounting of royalties on oil and gas leases, filed July 30, 1980, at Jt. App. 141a; (e) Order of the United States District Court for the District of New Mexico on motions to reconsider the July 30, 1980 opinion and order, filed January 26, 1981, at Jt. App. 154a; (f) Opinion and Order of the United States District Court for the District of New Mexico on cross-claims of Southland Royalty Company, Supron Energy Corporation and Exxon Corporation against Gas Company of New Mexico, filed June 1, 1981, at Jt. App. 165a and 173a; and (g) Order

of the United States District Court for the District of New Mexico amending order of June 1, 1981, filed July 1, 1981, at Jt. App. 175a.

The opinion of the United States Department of the Interior, Interior Board of Land Appeals, on consolidated appeals from decisions of the Acting Deputy Commissioner for Indian Affairs pertaining to royalty values, decided March 21, 1980, is reported at 46 I.B.L.A. 181 (1980) and is reprinted at Jt. App. 176a.

JURISDICTION

The Respondent, Jicarilla Apache Tribe, originally filed this suit in the United States District Court for the District of New Mexico on May 7, 1975. After amendment of its complaint and further amendment to allow the pleadings to conform to the proof at trial, the Tribe invoked federal jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1362 (1982); 25 U.S.C. §§ 396a-g (1982); 5 U.S.C. §§ 701-706 (1982); and 15 U.S.C. §§ 1, 2, 15 and 19 (1982). Following trial on the merits, the District Court rendered its decision on November 5, 1979. After entry of supplemental interim opinions and orders, the District Court entered final judgment on June 1, 1981. All parties filed timely notices of appeal and cross-appeal to the United States Court of Appeals for the Tenth Circuit.

On February 24, 1984, a divided three-judge panel of the United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part the judgment of the District Court. On January 26, 1986, on rehearing, a divided Court of Appeals for the Tenth Circuit sitting *en banc* affirmed in part and reversed in part the judgment of the District Court and adopted the prior dissenting opinion to the panel decision, with certain exceptions and additions, as the opinion of the Court. Petitioners Southern Union Company, Unicon Producing Company and Exxon Corporation timely filed petitions for further rehearing with suggestion for rehearing *en banc* on February 5 and 6, 1986. The Court of Appeals denied the

petitions for rehearing on April 15, 1986. Following the granting of an extension of time, the Secretary of the Interior timely filed an application for modification of the Court's *en banc* decision on March 6, 1986. The Court denied the Government's application for modification of its *en banc* opinion on June 18, 1986. On that same date, the Court of Appeals, on its own motion, issued a supplement to the *en banc* opinion.

Upon the filing of timely applications with this Court, the Honorable Byron R. White granted Petitioners Southern Union Company, Unicon Producing Company, Southland Royalty Company, and Exxon Corporation extensions of time to and including August 13, 1986 within which to file petitions for writ of certiorari. The jurisdiction of this Court to review the *en banc* Opinion of United States Court of Appeals for the Tenth Circuit, filed January 23, 1986 and supplemented June 18, 1986, is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

25 U.S.C. § 396a-g (1982), Indian Mineral Leasing Act of 1938. The full text of the Indian Mineral Leasing Act is reprinted at Jt. App. 200a.

25 C.F.R. Part 211 (1985) (formerly codified at 25 C.F.R. Part 171 (1981)), reprinted at Jt. App. 214a.

30 C.F.R. Part 221 (1981), reprinted at Jt. App. 238a.

30 C.F.R. Part 206 (1985), reprinted at Jt. App. 283a.

43 C.F.R. Part 3160 (1985), reprinted at Jt. App. 291a.

STATEMENT OF THE CASE

Introduction

This petition concerns the liability of three natural gas producers [1] to the Jicarilla Apache Tribe ("the Tribe")

[1] The three producing companies are Unicon Producing Company ("Unicon"), formerly Supron Energy Corp. ("Supron"), formerly Southern Union Production Company ("SUPC"); Southland Roy-

for the alleged underpayment of royalties from 1970 to the present. The royalties are derived from the value of natural gas produced on reservation land. All sixteen reservation oil and gas leases in question ("the IMLA Leases") have been issued since 1950 pursuant to the Indian Mineral Leasing Act of 1938 ("IMLA"), 25 U.S.C. § 396a-g (1982). Under the IMLA, all lease operations, including the determination of royalties, are "subject to the rules and regulations promulgated by the Secretary of the Interior [("the Secretary")]." 25 U.S.C. § 396d. From the time the IMLA Leases were first entered into until the filing of this action, the Secretary exercised his discretion as expressly provided by the regulations to determine the Tribe's royalties based on the sales price of the gas. The Tribe sought to impose upon the Secretary different royalty accounting procedures under the regulations. The Tribe prevailed. Thus, the purported underpayment of royalties is the result of the Lessees' faultless compliance with the Secretary's interpretation of his own regulations in the exercise of his discretion, which the District Court and the Court of Appeals held violated the Federal Government's fiduciary duty to the Tribe.

I. THE FACTUAL SETTING

A. The Production and Sale of Natural Gas Under the IMLA Leases and the Extraction of Liquid By-Products

All of the gas produced under the IMLA Leases contains liquid hydrocarbon substances, such as butane, propane and natural gasoline. Their presence increases the Btu content of the gas. Because of its relatively high liquid content, the gas involved in this case is called "wet gas."

All of the gas produced under the IMLA Leases was sold at the wellhead by the Lessees to Southern Union

---

alty Company ("Southland"), formerly Aztec Oil and Gas Co. ("Aztec"); and Exxon Corporation ("Exxon"); hereinafter collectively "the Lessees."

Company ("Southern Union," formerly Southern Union Gas Company), for use by its operating division, Gas Company of New Mexico ("GCNM"), New Mexico's largest natural gas public utility.[2] The gas purchase agreements pertaining to the IMLA Leases date from 1953. Originally, Southern Union paid a base contract price for natural gas produced from the IMLA Leases. As the market for liquid by-products developed, Southern Union began to pay the Lessees a base price plus a penny per thousand cubic feet of gas for the liquid content. Beginning in 1974, the gas sales contracts included a pricing provision by which the contract price was adjusted to reflect the actual Btu content of the gas. The Btu price adjustment increased the amount realized by the Lessees upon sale of the gas and accounted for the value of the liquid components.

Following purchase at the wellhead, Southern Union transported the gas through its pipeline system to its processing plant. There, the wet gas was separated into its constituent liquid by-products and residue dry gas. From 1971 to 1976 the processing plant was owned and operated by SUPC, in which Southern Union then held a controlling interest. Following extraction at the plant, the liquid products were sold to third parties. During the period SUPC owned the plant, it received a portion of the revenues derived from sale of the liquids. Southern Union always retained ownership of the residue dry gas, which was sold after the completion of processing to customers of GCNM.

Under the gas sales contracts, Southern Union received title to the wet gas at the wellhead and had the right to extract all liquid by-products. With the exception of SUPC during the period it owned the processing plant,

---

[2] On January 28, 1985 Southern Union sold substantially all of the assets of GCNM to Public Service Company of New Mexico. As part of that sale Southern Union retained certain liabilities, including liability up to the date of sale for additional royalties which may be assessed in this litigation.

none of the Lessees ever derived any revenue from the extraction and sale of liquids. The actual amount realized by the Lessees from the sale of the wet gas produced under the IMLA Leases was the Btu-adjusted sales price.

B. The Secretary's Determination of the Tribe's Royalties

The IMLA Leases are all standard-form federal lease agreements.[3] With respect to the computation of royalties, the IMLA Leases provide that royalties shall be based on the value of the gas. In this regard, Paragraph 3(c) of the IMLA Leases tracks the language in 25 C.F.R. § 211.13(a) (1985), which provides in part as follows:

> . . ."[V]alue" for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. *The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value.*

25 C.F.R. § 211.13(a) (1985) (emphasis added).[4]

Paragraph 3(g) of the IMLA Leases also incorporates additional federal regulations which deal with royalty de-

---

[3] U.S. Dept. of Interior, Oil and Gas Mining Lease for Tribal Indian Lands, Lease Form 5-157 (1964). The lease form has remained essentially unchanged since 1939 and is reproduced at Jt. App. 377a.

[4] This regulation was formerly codified at 25 C.F.R. § 171.13(a) (1981); it was redesignated March 30, 1982.

termination.[5] These regulations gave the Secretary complete authority to determine the Tribe's royalties. The Secretary had authority to approve, modify or revoke all gas sales contracts. The Secretary prohibited lessees from selling natural gas without a sales contract first approved by him. The Secretary established the value of the gas for royalty purposes. The Secretary rendered monthly statements for the amount accruing as royalty from each lease. And the Secretary required all lessees to tender payment of royalties in accordance with the value he determined.[6]

The Lessees paid royalties based upon such determinations by the Secretary. Each month the Secretary required the Lessees to file a report showing all sales of gas from the IMLA Leases and the resulting royalty accruing to the Tribe.[7] The Secretary required the Lessees to verify in this report the volumes of gas produced and its sales price and to compute the value of the gas for royalty purposes by multiplying the volume of production times the sales price. Transcript ("Tr.") Vol. I at 155-156. With this "standard method" of reporting royalties, the Secretary also required the Lessees to file a monthly remittance form, accompanied by payment of the Tribe's royalties.[8] Thereafter, the Secretary reviewed

---

[5] Paragraph 3(g) incorporates the regulations found in 30 C.F.R. Part 221 (1981), which were amended and redesignated effective November 26, 1982. Prior to that date these regulations had remained essentially unchanged since first promulgated in 1942. *See* 7 Fed. Reg. 4132 (1942). The provisions governing oil and gas lease operations, other than royalty accounting, are now codified in 43 C.F.R. Part 3160 (1985). The regulations which concern royalty determination are codified in 30 C.F.R. Part 206 (1985). The prior regulations are cited in this petition where there is no corresponding provision in the new regulations or where the new regulations are different from the regulations in effect at the time of the Secretary's actions in this case.

[6] *See*, respectively, 30 C.F.R. §§ 221.3, 221.12, 221.13, 221.38, 221.40 and 221.47 (1981).

[7] *Id.* § 221.62; Form 9-361, reproduced at Jt. App. 387a.

[8] *Id.* § 221.63.

these reports and issued his statement of account with respect to each lease.[9] Until this litigation, the Secretary uniformly followed this procedure to bill and collect the Tribe's royalties. In short, the Secretary exercised his discretion to accept the actual amount realized by the Lessees from the sale of the gas as conclusive evidence of its royalty value.

II. PROCEEDINGS IN THE COURTS BELOW

A. The Tribe Sues for Additional Royalties Based on Dual Accounting.

Dissatisfied with the royalty income derived from the Secretary's determination of value, the Tribe initiated this action in 1975, claiming jurisdiction under 28 U.S.C. §§ 1331, 1332, 1362 (1982); 25 U.S.C. § 396a-g (1982); and 5 U.S.C. §§ 701-706 (1982). The Tribe alleged that under the IMLA Leases and the regulations the Secretary was required to determine the royalty value of wet gas in two distinct ways and to compute its royalties by using the higher value. In such "dual value accounting," the sales price of the gas at the wellhead is compared to the aggregate value of the liquid by-products extracted from the gas plus the value of the residue dry gas less an allowance for the cost of extraction.[10] *See* 30 C.F.R. §§ 206.105(c), 206.106 (1985). Royalty computations are then based on the higher of these two amounts.

The Tribe drew support for its dual accounting claim from the last sentence in Paragraph 3(c) of the IMLA Leases and the corresponding sentence in 25 C.F.R. § 211.13(a) (1985), which provides:

> In determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for

---

[9] *Id.* §§ 221.12, 221.40.

[10] "Aggregate value" royalty accounting is commonly known as "net realization" accounting. The two terms are used interchangeably. Net realization means the value of the extracted liquid by-products and residue dry gas, after allowance for the cost of manufacture.

> the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that *royalty will be computed on the value of gas or casing-head gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.*

25 C.F.R. § 211.13(a) (1985) (emphasis added).

The Tribe argued that this sentence mandated dual value accounting by the Secretary. Dual accounting was not a new concept in the computation of royalties under leases subject to federal regulation. The Secretary had required dual accounting by lessees who, instead of selling wet gas at the wellhead, elected to process the gas, either themselves or through an affiliate, and to sell the extracted liquid products and residue dry gas after processing. The Secretary required SUPC, for example, to provide dual accounting for the Tribe's royalties when it owned and operated the processing plant. Tr. Vol. I at 122; Tr. Vol. II at 36-37. *See In re Supron Energy Corp.*, 46 I.B.L.A. 181 (1980), Jt. App. 176a. The Secretary's dual accounting practice thus appeared consistent with the applicable regulation which provides:

> If the lessee derives revenue on gas from two or more products, a royalty normally will be collected on all such products.

30 C.F.R. § 206.105(b) (1985). Moreover, as of the time of trial the Secretary had never required dual value accounting by any lessee who did not own an interest in a processing plant or otherwise profit from the extraction and sale of liquid products. Tr. Vol. I at 126, 138; Tr. Vol. II at 34; *see also* Jt. App. 24a.

According to the Tribe, however, the failure of the Secretary to require dual accounting by all Lessees for its royalties constituted a breach of the Federal Government's fiduciary duty. As for the Lessees, the Tribe alleged that their failure to pay royalties based on the higher of the two values that would have been derived

through dual accounting constituted breach of the IMLA Leases, regardless of the failure of the Secretary to require them to so account.

B. The District Court Rejects Dual Accounting, Then Reverses Itself.

Initially, the District Court rejected the Tribe's dual accounting claim. The court held on summary judgment that the Secretary's determination of the Tribe's royalties:

> [W]as an exercise of the Secretary's discretion based upon the regulations and the leases, whereby he conclusively established value for royalty purposes as the sale price received at the wellhead.

Jt. App. 68a. The Tribe moved for reconsideration. The court denied the motion and remarked:

> Sales price may be taken by the Secretary to be conclusive evidence of value for royalty purposes. . . . His action in doing so does not constitute an abuse of this discretion.

Jt. App. 76a (citations omitted).

Despite these rulings, the District Court revived the Tribe's dual accounting claim after trial on the merits. Without reference to any substantive legal source, the court held that the Secretary had breached a fiduciary duty to the Tribe "because the method by which he computed royalties did not derive for the Tribe the highest royalties payable under the lease terms and the federal regulations. . . ." Jt. App. 126a. The court ordered the Secretary to require dual accounting by all Lessees. Jt. App. 135a.

The court reasoned that, because the Federal Government had breached its fiduciary duty to the Tribe by failing to require dual value accounting, the Lessees necessarily had breached the IMLA Leases with respect to the payment of royalties, although their breaches were "technical in nature," Jt. App. 136a, and occurred "through no apparent fault" of their own, Jt. App. 127a. The court ordered the Lessees to account prospectively for

tribal royalties in accordance with the dual accounting procedures it imposed on the Secretary, Jt. App. 139a, and, without any reference to the law of fiduciary responsibility, it awarded retrospective damages to the Tribe against the Lessees for the amount by which the Tribe's royalties purportedly had been underpaid from 1970 until the court's decision in 1979.[11] Jt. App. 138a, 139a.

C. The Court of Appeals Expressly Rejects the Imposition of Fiduciary Standards, Then Reverses Itself.

A divided panel of the Court of Appeals reversed the District Court's judgment requiring dual value accounting. The majority expressly recognized that the Secretary may exercise discretion to determine the Tribe's royalties based on the sales price of the gas. Jt. App. 26a. The majority found nothing in the record to indicate that the Secretary had acted arbitrarily or capriciously by not requiring dual accounting by all Lessees. Jt. App. 29a. The majority found that the Secretary's royalty accounting practices had a reasonable basis in the lease and the regulations, conformed to standard royalty accounting practices in the oil and gas industry, and were consistent with case law in the Tenth Circuit. Jt. App. 28a-29a. Thus, the majority concluded there was "no basis for the trial court's determination as to fiduciary standards." Jt. App. 30a.

---

[11] When the Tribe sued the Lessees for additional royalties, the Lessees filed crossclaims against Southern Union for indemnification. The indemnity claims were based on an "excess royalty" clause in the gas sales contracts, which provided that if royalty payments to the Tribe were calculated on a value in excess of the sales price of the gas, Southern Union would reimburse the Lessees for such additional amounts. When the District Court entered judgment against the Lessees, it also entered judgment against Southern Union on the crossclaims. The Court of Appeals affirmed both judgments. Southern Union, by this petition, seeks review of the judgment against the Lessees and of the judgment against it on the crossclaims.

On rehearing, a divided Court of Appeals sitting *en banc* overruled the majority and adopted the dissenting opinion to the panel decision. Jt. App. 3a. The court held that the Federal Government had breached its fiduciary obligation to the Tribe by failing to require dual accounting by all Lessees for the Tribe's royalties. Jt. App. 48a. The court decided that the IMLA created an express trust between the Government and the Tribe with respect to the determination of its royalties. Jt. App. 40a. The court found that the purpose of the IMLA trust is to derive the "greatest return" for the Tribe, Jt. App. 40a, and concluded that the Government's fiduciary duty required the Secretary to apply whichever royalty accounting method authorized by the regulations yields the Tribe the "greatest royalties." Jt. App. 48a. Like the District Court, the Court of Appeals made no reference to the law of fiduciary responsibility in affirming the judgment in favor of the Tribe and against the Lessees.

D. The Court of Appeals Imposes Liability Against the Lessees for the Federal Government's Breach of Trust to the Tribe.

In a supplement to the *en banc* opinion, the court for the first time addressed the question who must pay for the United States' purported breach of trust to the Tribe. Calling attention to the statement of this Court in *Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983), the Lessees and Southern Union had argued that the Tribe's remedy for breach of a fiduciary obligation by the Government is against the Government, not against them. The court rejected this argument. Reasoning that the relationship between the Tribe and the Lessees is contractual, the court held:

> That the Secretary breached its fiduciary duty to properly enforce the leases does not excuse the lessees from subsequently having to pay the amounts determined to be owed under the leases.

Jt. App. 19a.

E. The Federal Government Seeks to Impose Liability on the Lessees, While Maintaining That It Has Never Breached Its Obligation to the Tribe.

Throughout this litigation the Federal Government has attempted to uphold the imposition of liability against the Lessees for the damages caused by the Secretary's alleged violation of his obligation to the Tribe. Despite being found liable for breach of trust, the Government did not appeal the District Court's ruling, ordering the Secretary to require dual accounting by all Lessees in determining the Tribe's royalties. Before the three-judge panel the Government argued that the trial court's dual accounting order should not be disturbed because the Secretary has the discretion under the regulations to require dual value accounting by all Lessees and desired to do so, retroactively as well as prospectively.[12] The panel majority found, however, that the Secretary had changed his position respecting dual accounting in response to rulings by the District Court. Jt. App. 29a. The majority ruled that the Secretary's prior long-standing dual accounting procedures must be applied through the conclusion of this case. *Id.*

On rehearing the Government made a different argument. It asserted that prior to the District Court's decision the Secretary had already decided to require dual accounting by all Lessees for the Tribe's royalties. This independent exercise of administrative discretion is purportedly embodied in a statement in a trial court brief filed in other litigation in which the Secretary apparently indicated that dual accounting by all lessees would be implemented "if the authority to do so is clarified." [13]

Disturbed by the *en banc* decision holding that the Secretary in fact had breached his obligation to the

---

[12] Secretary of the Interior, Reply Brief, *Jicarilla Apache Tribe v. Supron Energy Corp.*, No. 81-1860 at 5-8 (10th Cir.).

[13] *See* Secretary of the Interior, Supplemental Brief on Rehearing, *Jicarilla Apache Tribe v. Supron Energy Corp.*, No. 81-1860 at 12-14 (10th Cir.).

Tribe, the Government sought to revise the court's opinion. In its application to modify the standard of liability for breach of trust adopted by the Court of Appeals, the Government argued for a third time that the Lessees should pay for the harm caused by the Secretary's breach. According to the Federal Government, the imposition of damages against the Lessees in favor of the Tribe serves merely to return the parties "to the position they should have occupied all along." [14]

Despite these attempts to shift liability to the Lessees for its actions, the Government also has maintained consistently that the Secretary has never breached any obligation of trust to the Tribe. Indeed, before the three-judge panel the Government argued that the IMLA does not establish fiduciary duties in the Secretary's administration of the IMLA Leases.[15] And, when the Government moved to modify the court's *en banc* decision, it asserted that the "opinion articulates the judicial standard for finding a breach of fiduciary duty by the Secretary in a way that is in conflict with both the case law developed in the Court of Claims . . . and the understanding of Congress." [16] The Government contended that the standard by which to test the liability of the Secretary for breach of Indian trust obligations is "whether the Secretary's actions were 'in good faith and within the realm of their acceptable [discretion], or were they arbitrary, capricious, an abuse of discretion, or contrary to law?' " [17] The Government urged the court to revise the *en banc* opinion to prevent an "erroneous 'split in the circuits' concerning the proper standard for judicial resolution of

---

[14] Secretary of the Interior, Application for Modification of the Court's *en banc* Decision, *Jicarilla Apache Tribe v. Supron Energy Corp.*, at 4 n.2 (10th Cir.).

[15] Secretary of the Interior, Brief-in-Chief, *Jicarilla Apache Tribe v. Supron Energy Corp.*, No. 81-1860 at 19-22 (10th Cir.).

[16] Secretary of the Interior, Application for Modification, *supra* n.14 at 6 (citations omitted).

[17] *Id.* (citations omitted).

breach of fiduciary duty claims." [18] The Court of Appeals denied the motion. Jt. App. 18a.

The liability of the Lessees for the Government's alleged violation of a fiduciary obligation to the Tribe having been affirmed, this Petition for Writ of Certiorari has followed.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRONEOUSLY IMPOSED LIABILITY ON INNOCENT THIRD PARTIES FOR THE FEDERAL GOVERNMENT'S PURPORTED BREACH OF TRUST.

"[I]f it were held that there was a breach of duty by the Secretary the trial court applied the remedy to the wrong parties and so punished the lessees although it stated that they were in no way at fault." Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 861 (10th Cir. 1986) (Seth, C.J., dissenting).

A. The Decision Below Conflicts With *Nevada v. United States, United States v. Mitchell* and *Seminole Nation v. United States.*

In a four-to-three *en banc* decision, the Court of Appeals has created a unique remedy in federal Indian law. According to the court, an Indian tribe has a remedy against innocent third parties for the harm caused by the Government's breach of trust. This remedy is unknown to the law of fiduciary relations. And its use conflicts with specific principles articulated by this Court.

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court held that a judicial decree, adopted pursuant to a settlement agreement entered into by the United States on behalf of an Indian tribe adjudicating the tribe's water rights, precluded the tribe from bringing a subsequent action for additional water rights against other parties bound by the same settlement. Although *Nevada* was decided under the doctrine of *res judicata*, the principles of

[18] *Id.* at 7.

Indian trust law which the Court there delineated respecting (a) the remedy of an Indian tribe against the United States and (b) the liability of third parties for breach by the United States of its trust obligations, are directly applicable here.

In *Nevada*, the Pyramid Lake Paiute Tribe contended that by representing the interests of both a federal reclamation project and the Tribe in the earlier adjudication of its water rights, the Government breached its fiduciary obligation of undivided loyalty to the Tribe and deprived the Tribe of a full and fair opportunity to be heard in the first proceeding. Based on this alleged denial of due process, the Tribe concluded that the final decree in the prior action could not extinguish its subsequent claim for additional water rights.

This Court concluded otherwise. This Court rejected the proposition that the Government necessarily violates a fiduciary duty to an Indian tribe simply because it represents other federal interests, as required by Congress, in the same litigation. In reaching this decision, the Court also spelled out two basic principles of Indian trust law.

First, the Court assured the Indians they have a remedy for damages against the Government for breach of its trust obligations:

> If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for the breach of duty that the United States has admitted.

Id. at 145 (Brennan, J., concurring). Like the Pyramid Lake Paiute Tribe in *Nevada*, the Tribe here also has a remedy against the Government for damages in the Court of Claims. And also like the Tribe in *Nevada*, the Jicarilla Apache Tribe here has taken advantage of that remedy. Jt. App. 41a.

Second, this Court made clear in *Nevada* that the Tribe's remedy is not available against innocent third parties:

> If in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.

Id. at 144 n.16.

Three days after its declaration of principles in *Nevada*, this Court held in *United States v. Mitchell*, 463 U.S. 206, 226 (1983) (*"Mitchell II"*), that an Indian Tribe has a remedy at law requiring the Federal Government to respond in money damages for breach of fiduciary obligations imposed by federal statutes. Although *Mitchell II* did not address, as this case does, the liability of third parties to the Indian beneficiaries of a federal statutory trust, the decision makes clear that in such situations the United States is held to standards applicable to a private fiduciary. *Id.* The necessary corollary to this rule is that when the Federal Government acts as a private trustee, a third party cannot be held liable for the Government's breach of trust, unless the third party has notice of and participates in the Government's violation of fiduciary duty. *See Restatement (Second) of Trusts* §§ 284, 296, 297 (1959); IV A. Scott, *Law of Trusts* §§ 279A, 283, 296 (3d ed. 1967); G. Bogert, *Law of Trusts and Trustees* §§ 901, 902 (2d ed. rev. 1982).

Moreover, the rule which governs third-party-liability has been applied by this Court to determine the liability of the Government when it has notice of and participates in a trustee's breach of duty. *Seminole Nation v. United States*, 316 U.S. 286 (1942); *cf. United States v. Dann*, 105 S.Ct. 1058, 84 L.Ed.2d 28, 35-36 (1985). In *Seminole Nation*, this Court reviewed whether the United States could be held liable for the misappropriation by tribal fiduciaries of federal funds paid by the Government to the tribe for the benefit of its individual members. This Court recognized that liability could be imposed against the United States because:

> [A] third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary.

Seminole Nation, 316 U.S. at 296 (citations omitted).

Mitchell II described the right of the beneficiary to sue the trustee for damages resulting from breach of trust as "a fundamental incident" of a trust relationship between the United States and an Indian Tribe. *Mitchell II*, 463 U.S. at 226. The decisions in *Seminole Nation*, *Nevada* and *Mitchell II* require the same conclusion here. The well-established principles that determine third-party-liability, and nonliability, for damages resulting from a breach of trust by the trustee must also be a fundamental incident of a trust relationship between the United States and an Indian tribe. Under these decisions, the Tribe's remedy for such damages is properly against the Federal Government, not against the Lessees.

B. The Decision Below Interferes With and Undermines Indian Contracts and the Development of Indian Leasing Enterprises.

If the Court of Appeals' decision is upheld, it will undercut certainty and fairness, the twin goals inherently sought in all commercial transactions, in every agreement between Indians and third parties for which the Federal Government is responsible as trustee.

Other than Indian timber management and management of Indian oil and gas reserves under the IMLA, federal courts have yet to consider what other laws and regulations establish federal fiduciary duties. There are, however, at least seven other statutes that charge the Government with responsibilities in the leasing of Indian land.[19] Thus, the Government plays an important role in

---

[19] In addition there are numerous federal statutes which authorize the Federal Government to contract directly with third parties for the purpose of serving a variety of other Indian interests: 25

all leases of Indian land for grazing, mining and farming, as well as for public, religious, educational, recreational, residential and business purposes.[20] In all such leases there is a contractual relationship between the Indians and the lessees, but the Federal Government exercises discretion in supervising the leesees' performance. If the Government's obligation to prescribe and oversee the performance of the lessees is fiduciary in nature then, under the holding of the Court of Appeals, even the Government's breach of "its fiduciary duty to properly enforce the leases does not excuse the lessees from subsequently having to pay the amounts determined to be owed under the leases." Jt. App. 19a.

The grave consequence of this truly aberrant judicial decision is that third parties will no longer be able to engage in Indian commerce on the basis of settled economic expectations. The decision thus jeopardizes the continued development by non-Indians of all Indian natural resources and reservation-based enterprises.

These consequences can perhaps best be understood through an example of how the court's decision would operate in the setting of *Mitchell II*. There, speaking of Indian timber management, this Court observed that "if timber on an allotment has been destroyed through government mismanagement, it will take many years for nature to restore the timber." *Mitchell II*, 463 U.S. at 227-28. For this reason, Congress directed the Secretary, as a trustee, to manage Indian forest resources "on the principle of sustained-yield management." 25 U.S.C. § 466 (1982). To carry out this objective, the Secretary is re-

---

U.S.C. § 309 (1982) (adult vocational training); The Johnson-O'Malley Act, 25 U.S.C. §§ 452, 453, 454, 457 (1982) (medical care and social welfare); 25 U.S.C. §§ 458(a)-(g), 458a-e (1982) (school construction); Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.* (1982); 25 U.S.C. § 2001 (1982) (BIA education programs).

[20] *See* 25 U.S.C. § 397 (1982); 25 U.S.C. § 398a-e (1982); 25 U.S.C. § 399 (1982); 25 U.S.C. § 400a (1982); 25 U.S.C. 402a (1982); 25 U.S.C. § 403 (1982); 25 U.S.C. §§ 415, 415a-d (1982).

quired to develop a "harvest schedule," 25 C.F.R. § 163.4 (1985), and to restrict "clear-cutting" of Indian forests, *id.* at § 163.5. If the decision of the Tenth Circuit is allowed to stand, however, it is not just the Government but also the timber cutter who will be liable to the Indians once the land is logged off and of little value. Under the ruling of the Tenth Circuit, even strict compliance with the Secretary's harvest schedule and clearing program, as expressly incorporated into a timber cutting contract, approved by the Secretary, will not prevent the imposition of subsequent liability on the logger, if the Secretary fails to discharge properly his fiduciary obligations.[21]

Like the Lessees here, loggers are supervised by the Secretary in the day-to-day performance of their contracts with the Indians. Like the Lessees here, they are required to deal exclusively with, and must therefore be able to rely upon, the Federal Government in the performance of their contractual obligations. Yet, under the ruling of the Tenth Circuit, no matter how pervasive the Government's authority or how comprehensive its responsibilities over a particular lease, contract or other agreement, from now on third parties will deal with the Federal Government at their peril.

II. THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD WHEN IT DETERMINED THAT THE FEDERAL GOVERNMENT COMMITTED A BREACH OF TRUST.

> "[*T*]*here was no finding that the Secretary had acted in an arbitrary or capricious manner. . . . This is mentioned because this finding has unusual implications in this case.*" *Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855, 857 (10th Cir. 1986) (Seth, C.J., dissenting).*

---

[21] *See Mitchell v. United States,* 10 Cl.Ct. 63, 65-66 (1986) (detailing the nature and extent of such claims already brought against the Government by the Indians for breach of trust).

A. The Decision Below Conflicts With *United States v. Mason, United States v. Mitchell* and Decisions Of The Court of Claims.

As announced by the Court of Appeals, when the Government acts as a trustee, the standard of conduct that it must observe is not defined in the terms of the statute and the regulations which establish the Government's trust responsibilities, nor is the standard found in the concept of discretion as that term is used in the law of trusts. The decision therefore conflicts openly with the decisions of this Court in *Mitchell II* and *United States v. Mason*, 412 U.S. 391 (1973).

When the Federal Government has legal as opposed to moral trust obligations to the Indians, it may be held to standards of conduct expected of a private trustee.[22] In *Mason* this Court ruled that when the Government holds Indian money or property in trust pursuant to a federal statute, the Government is bound by such standards. *Id.* at 398. Quoting from Professor Scott's treatise, this Court defined the standard to which the Government must adhere in such situations in familiar terms:

> A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.

Id.[23] Similarly, in *Mitchell II* this Court relied on common-law trust principles to find that the Federal Govern-

---

[22] Caution should be used, however, in holding the United States to the same standards required of a private fiduciary. *See Nevada*, 463 U.S. at 142; *see also* Jt. App. 6a.

[23] Decisions in which the standard of reasonable care has been applied to determine whether the Federal Government has violated a fiduciary obligation to the Indians include: *Moose v. United States*, 674 F.2d 1277, 1283-84 (9th Cir. 1982); *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 989 (Ct. Cl. 1980); *Coast Indian Community v. United States*, 550 F.2d 639, 652 (Ct. Cl. 1977); *cf., American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990, 993 (Ct. Cl. 1981), *cert. denied*, 456 U.S. 989 (1982).

ment may be liable for breach of standards applicable to a private trustee. *Mitchell II*, 463 U.S. at 226.

In both cases, this Court also laid out rules with respect to the use of common-law standards of conduct to determine whether the United States has acted in accordance with its fiduciary responsibilities. *Mitchell II* requires that when the Government serves as a trustee, its trust responsibilities, that is, its powers and its duties, are defined by the terms of the statute and the regulations which establish its fiduciary relationship with the Indians. *Id.* at 224. And *Mason* teaches that when a federal statute establishing an Indian trust does not define the standard which the Government must live up to, "familiar principles" from the law of trusts normally will do so. *Mason*, 412 U.S. at 398.

When the Court of Appeals' decision is read in light of these rules, its violation of them is obvious. First, in describing the Federal Government's trust responsibilities under the IMLA, the court failed to define the standard of conduct required of the Secretary—that is, the "contours" of his fiduciary responsibilities—by reference to the statute and the regulations which in unambiguous language confer upon the Secretary *the power to exercise discretion* in determining the Tribe's royalties. 25 U.S.C. § 396d (1982); 30 C.F.R. §§ 221.3, 221.4, 221.12, 221.40, 221.47 (1981); *see Mitchell II*, 463 U.S. at 224. The regulations and the IMLA Leases further define the exercise of the Secretary's discretion to include the acceptance of sales price as conclusive evidence of the royalty value of the gas. 25 C.F.R. § 221.13(a) (1982). Accordingly, by exercising his discretion in this manner, the Secretary also could not have abused or exceeded it, and thus he could not have violated a fiduciary duty to the Tribe in determining its royalties.[24]

---

[24] Indeed, a Court of Appeals has described the regulatory provisions authorizing the Secretary to determine the value of the gas for royalty purposes as "extraordinary" and refused to allow the Secretary to apply the regulations retroactively to redetermine royalty liability. *Continental Oil Co. v. United States*, 184 F.2d 802,

Moreover, the terms of the IMLA and the regulations do not impose any duty on the Secretary which would prohibit the exercise of this discretion. Rather, the duty of the Secretary, as defined in the regulations, is to determine royalties based solely on the "reasonable value" of the gas. 30 C.F.R. § 221.47 (1981).

Because the regulations expressly define the contours of the Secretary's trust responsibility, there is no occasion to resort to common-law trust principles to further determine the scope of that responsibility. Had the Court of Appeals elected to examine the law of trusts, however, by placing reliance on this Court's decision in *Mason*, such an inquiry would have avoided the adoption of an erroneous standard of conduct. As Professor Scott has written:

> To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him. The Court will not substitute its own judgment for his.

III A. Scott, *supra*, p. 18, § 187 at 1501 (emphasis added).

Application of common-law trust principles also establishes that even when a trustee is under a duty to produce the "greatest return" or to act "in the best interests" of the beneficiary, the trustee commits a breach of duty in the exercise of discretion only if he acts beyond the bounds of reasonable judgment. *Id.* § 187.2 at 1514. Here, the Court of Appeals twice recognized that the decision of the Secretary to require dual accounting only by lessees who derived revenue from the sale of liquid by-products was reasonable, Jt. App. 45a, 48a; yet the court went on to overrule the Secretary's decision and to substitute its own judgment as to what was in the best interests of the Tribe.

The decision below is also in conflict with decisions of the Court of Claims. In *Mitchell v. United States*, 664

---

821 (9th Cir. 1950); *cf. Atlantic Richfield Co. v. Hickel*, 432 F.2d 587 (10th Cir. 1970).

F.2d 265 (Ct. Cl. 1981), the court considered the appropriate standard for the imposition of liability against the United States for breach of trust. The regulations at issue in *Mitchell* had historically required the Government "to obtain the greatest revenue for the Indians . . . ." *See Mitchell II*, 463 U.S. at 224. Nevertheless, the Court of Claims held:

> [T]he standard by which Interior's actions are to be judicially tested is not the court's or plaintiff's own view of the preferable conduct, but the normal standard for government fiduciaries—were their actions in good faith and within the realm of their acceptable discretion, or were they arbitrary, capricious, an abuse of discretion, or contrary to law?

Mitchell, 664 F.2d at 274. In *Mitchell II*, this Court affirmed that decision, although it did not discuss the requisite standard of conduct. Since *Mitchell II*, the Court of Claims has continued to apply this standard. *Navajo Tribe of Indians v. United States*, 9 Cl.Ct 336, 344 (1986). The Court of Appeals' decision here is thus at odds not only with the precepts of *Mason* and *Mitchell II* but with the whole history of the law of federal fiduciary responsibility as developed in the *Mitchell* line of cases.

B. This Court Should Determine the Standard for the Government's Breach of Indian Trust Obligations Because of Its Fundamental Importance to the Discharge of Federal Fiduciary Duties.

In 1982 Congress enacted the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1982). The House Report adopted prior to passage of the Act documents that Congress clearly understands the standard of conduct it has imposed on the Secretary in the performance of his fiduciary obligations respecting Indian oil and gas leases. The House Report reads:

> If the Secretary, acting as a trustee, approves a lease or an agreement or otherwise acts in relation to the trust resources of an Indian tribe and acts responsibily and within his discretion in doing so, the

> United States would not be liable for any loss or impairment of the trust resources. On the other hand, if the Secretary acts recklessly and in abuse of his discretion as trustee, the United States cannot avoid liability.

H.R. Rep. No. 746 on Indian Mineral Development Act of 1982, 97th Cong., 2d Sess., 7-8, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3465, 3469-70.

Despite such explicit congressional guidance, the Secretary's management of Indian royalty matters continues to be subject to criticism,[25] and, as this case demonstrates, his determination of Indian royalties has been inconsistent.

Complaints of Government neglect of Indian trust responsibilities led the House Appropriations Committee this year to order its staff to investigate the Secretary's management. With respect to Indian oil and gas leasing, the staff report concluded that the Secretary still does not understand his fiduciary obligations to the Indians:

> [T]he Investigative Staff was unable to obtain consistent definitions of "Trust Responsibility" and "Self-Determination" or how the requirements of each could be combined to carry out BIA's leasing responsibilities of natural resources. *It should be noted that the Director, Office of Trust Responsibilities stated "* * * the term (Trust Responsibility) has no meaning" and also added "* * * whatever that means."*

---

[25] *See* Indian Gov't Operations Comm., *Indian Gas Royalty Payments-Problems Persist* (July 19, 1985) cited in *Hearings on Department of Interior and Related Agencies Appropriations for 1987 Before the Subcomm. of the H.R. Comm. on Appropriations*, 99th Cong., 2d Sess., at 505 (Comm. Print 1986) (*"Hearings on Appropriations"*); *see also Interim BIA Task Force/Study Group Report on Indian Oil and Gas Lease Administration and Royalty Management* (Jan. 1985), quoted in *Hearings on Appropriations*, at 520.

Report of the Surveys and Investigations Staff, H.R. Comm. on Appropriations, at 2-3 (April 17, 1986) (emphasis added), quoted in *Hearings on Appropriations*, *supra* p. 26 n.25 at 517-18.

The Secretary's uncertain royalty administration is further confounded by the magnitude of reservation oil and gas production and resulting royalty revenues. Indian oil and gas reserves are located on forty reservations in seventeen states.[26] Under federal law the Secretary must determine tribal royalties from more than 4,000 Indian leases having more than 15,000 producing oil wells alone.[27] Since 1979, tribal oil and gas revenues have exceeded $200 million annually, and, if the Secretary has failed to fulfill his fiduciary duties during this period, it is estimated that lost Indian royalty revenues have been between $10 and $20 million annually.[28]

Whatever standard of conduct the Secretary is required to live up to, it is of vital importance that he know it and abide by it. Only then will lessees be able to transact business with Indian tribes on the basis of certainty and fairness. This petition presents this Court with an opportunity to speak authoritatively on the "contours" of the Federal Government's Indian trust responsibilities in the context of an activity that is a primary source of the Indians' livelihood, the continued development of their natural resources by non-Indians.

---

[26] American Indian Policy Review Comm'n, *Final Report* 339 (1977).

[27] *Hearings on Appropriations*, *supra* p. 26 n.25 at 509.

[28] *Id.* at 507.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SETH D. MONTGOMERY
(Counsel of Record)
MARK F. SHERIDAN
ANNE B. HEMENWAY
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504
(505) 982-3873
Attorneys for Petitioner
Southern Union Company